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IN THE

Supreme Court of the United States

October Term, 1960.

No. .....

CHARLES J. SMITH, DISTRICT DIRECTOR OF UNITED STEELWORKERS OF AMERICA, AN INTERNATIONAL UNION, AFFILIATED WITH THE AFL-CIO, INDIVIDUALLY AND IN A REPRESENTATIVE CAPACITY FOR AND ON BEHALF OF UNITED STEELWORKERS OF AMERICA, AN INTERNATIONAL UNION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, DISTRICT 38, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, DISTRICT 38, SUB-DISTRICT 1, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, LOCAL 2018, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO,

and

ALGERDAS N. CHELEDEN,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on September 14, 1960.

Citations to Opinions Below.

The Memorandum of Decision of the Judge of the Superior Court is reported, at 40 Labor Cases Paragraph 66,430, and is printed in Appendix B hereto, *infra*, pp. 4-30. The Order of the Supreme Court of California denying Writ of Prohibition was entered on September 14, 1960 without written opinion and is unreported.

Jurisdiction

The Judgment of the Supreme Court of the State of California was entered on September 14, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

Questions Presented.

Whether a state court, in an action brought without prior resort to the administrative procedures of the National Labor Relations Board, by a member of the group represented by the collective bargaining representative, has jurisdiction to determine whether a statutory collective bargaining representative, by its failure to proceed with an arbitration case concerning the alleged unlawful discharge of a union member, has breached its duty of nondiscriminatory representation under the Labor-Management Relations Act, 1947, as amended.

Statutes Involved.

The statutory provisions involved are National Labor Relations Act, 61 Stat. 14 ff, 29 U. S. C. Section 157, Section 158(b)(1), Section 159(a) and Section 160(a). They are printed in Appendix A, *infra*, pp. 1-3.

Statement.

Anthony J. Guzzo filed his Sixth Amended Complaint for damages for breach of fiduciary relationship, intentional breach of attorney-client relationship, malpractice and conspiracy, in the Superior Court of the State of California, in and for the County of Los Angeles. Guzzo, the President of the unit comprising the Southwest Steel employees represented by defendant unions, led an alleged wildcat strike of the unit. Southwest Steel discharged Guzzo for such conduct and his complaint against defendants is essentially for damages for failure to prosecute to conclusion his subsequent grievance against Southwest Steel based upon said discharge.

The federal question was raised in the California Superior Court (Court of first instance) by Demurrer which was overruled; thereafter was raised in the District Court of Appeal of California by Petition for Writ of Prohibition, which was denied;* thereafter was raised in the Supreme Court of California by Petition for Writ of Prohibition, which Petition dealt specifically and solely with said federal question, and which was denied. Pertinent quotations of specific portions of the record are printed in Appendix C, *infra*, pp. 31-32.

The Superior Court expressly stated in its decision that "it would be for the benefit of all the parties and this Court" if petitioner would "test the rulings of this Court as to the jurisdictional questions," *i.e.*, pre-emption, by appropriate appellate proceedings.

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*This will be our only refere. e to the District Court of Appeal proceeding which was not a jurisdictional prerequisite to the California Supreme Court's consideration of the case. California Code of Civil Procedure, Section 158.

The California Supreme Court's refusal to issue a Writ of Prohibition was a final judgment reviewable here under 28 U. S. C. Section 1257. (*Madruga v. Superior Court of California*, 346 U. S. 556, 557 (1954).)

The federal claim and the ground therefore were brought to the state court's attention with fair precision. (*New York ex rel. Bryant and Zimmerman*, 278 U. S. 63, 67 (1928).)

National Labor Relations Board procedures have have neither been restored to nor exhausted in the instant case.**

Reasons for Granting the Writ.

1. The decision of the court below in the instant case is in conflict with the decision of the Seventh Circuit Court of Appeals in *N. L. R. B. v. Die and Tool Makers Lodge No. 113, (Peerless Tool)*, 231 F. 2d 298, (C. A. 7, 1956) Cert. denied 352 U. S. 833. and with the earlier decision of this Court in *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248 (1944).

The *Wallace* case arose prior to the enactment of the Taft-Hartley Act and its first proscription of union unfair labor practices. The National Labor Relations Board had held that Section 8(3) (now Section 8(a)(3)) of the Act had been violated when employees who had supported an unsuccessful union in an organizational campaign prior to the certification election were discharged by the company under a closed shop agree-

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**That Southwest Steel is engaged in interstate commerce and subject to the National Labor Relations Act as amended was stipulated by all parties and is alleged in Paragraph VI of the Sixth Amended Complaint.

ment negotiated with the certified representative, since the company had known when it agreed to the contract that the union intended to refuse membership to these employees. The Supreme Court in affirming reasoned that to permit the union to penalize minority groups in the bargaining unit for their prior activities in behalf of another union would be to allow an interference with the minority's right to self-organization under Section 7 of the Act. It cannot be doubted that had this case arisen under the Taft-Hartley Act* violations of both Section 8(a)(3) and 8(b)(2) would have been found by the Board.

Referring to the duties of a bargaining agent, Mr. Justice Black, speaking for the majority, in the *Wallace* case, said at page 255:

> "By its selection as bargaining representative [the union] has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially * * * The Labor Relations Act was designed to wipe out * * * discriminations in industrial relations."

The *Peerless Tool* case involved alleged Section 8(b)(1)(A) violations as a result of a union representative's statemeent that "he would not represent the men in * * * grievances if they didn't have their assessments paid." The Circuit enforcing the Board order held, at page 302, that:

> "Such a threat is violative of Section 8(b)(1)-(A) of the Act, 29 U. S. C. A. Sec. 158(b)(1)-(A), because, in the terms of the statute, it tends

*61 Stat. 141 (1947), 29 U. S. C., Section 141 *et seq.* (Supp. 1951).

'* * * to restrain or coerce employees in the exercise of the rights guaranteed in section 7 * * *' Section 7 gives employees the right to engage in concerted activities for their mutual aid or protection, and the right to refrain from such activities. The employees of Peerless, therefore, had the right to refrain from paying the donation. Threatening to stop processing grievances for employees who did not pay the proper donation was coercive within the meaning of Section 8(b)(1)-(A). It was not simply internal administration of Union affairs because as the certified bargaining representative, *the Union is required by the Act to represent and bargain for all of the employees in the plant.* Ford Motor Co. v. Huffman, 345 U. S. 330, 337, 31 LRRM 2548, where the Court said that the unions' 'statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members without hostility to any.' "* (Emphasis supplied.)

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*With respect to "restrain" and "coerce" as these terms appear in Section 8(a)(1) and 8(b)(1)(A), the doing of a threatened act is, of course, the equivalent of threatening such act. The "restraint" and "coercion" are measured in terms of their effect on either the employee directly coerced or other employees. For example, see: *Modern Linen and Laundry Service*, 116 N. L. R. B. 284 (1956), where the Board found restraint and coercion in connection with the discharge of an exempt supervisor and ordered his reinstatement, solely because of the affect of the coercion on non-supervisory employees. Here the alleged discrimination against Guzzo for his conduct in connection with the walkout was a warning to all members of the union that to ignore the union dictate was at a member's peril, and was therefore clearly coercive, as similar conduct was found to be in *Peerless Tool.*

Here the alleged discrimination against Guzzo, *i.e.*, failure to prosecute his grievance to a conclusion, is as clear an invasion of Sections 7 and 8 of the Act as occurred in the *Wallace*, and *Peerless Tool* cases. Under the authority of *San Diego Bldg. Trades v. Garmon*, 359 U. S. 236, 245, (1959), "When an activity is arguably subject to §7 and §8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

2. The decision of the Court below in the instant case is in conflict with the decision in the case of *Huffman v. International Union, etc.*, 195 F. 2d 179 (C. A. 6) reversed on other grounds *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1952); and with National Labor Board decisions, *R. K. O. Radio Pictures, Inc.*, 61 N. L. R. B. 112, *Southwestern Portland Cement Co.*, 61 N. L. R. B. 1217, *Larus and Brothers Company, Inc.*, 62 N. L. R. B. 1075, and *Hughes Tool Company*, 104 N. L. R. B. 318 (1953).* In none of the cited cases did the Court, or Board, squarely pass upon the question of National Labor Relations Board preemption—nevertheless, the necessary implication of these decisions is in conflict with the decision of the court below. As noted the *Hughes* decision specifically leaves the Board Section 8(b) jurisdiction undetermined, and therefore "arguable."

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*In the *Hughes* case, at page 322, the Board emphasizes that the conduct found to be violative of Section 9 of the Act also may violate its unfair labor practice proscriptions of Section 8(b): "Whether such a concurrent [Section 8(b)] remedy does exist is undetermined."

In the *Huffman* case the Sixth Circuit held that Section 7 of the National Labor Relations Act* guarantees to employees a right to be free from discriminatory representation. If the right of nondiscriminatory representation is deemed to be included within the protection of Section 7, then it follows that the language of Section 8(b)(1)(A)** prohibits action by a labor organization in violation of that right. It then follows (as the National Labor Relations Board urged in its brief amicus to the Supreme Court in the *Huffman* case) that the Board would be vested with exclusive jurisdiction of the case. However, the issue of pre-emption was not argued in the Court of Appeals or mentioned in its opinion, but was first argued before this Court.

This Court disposed of the preemption issue in the *Huffman* case in footnote 4, at page 331, quoted here in its entirety:

> "4. In No. 194, International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. (Supp. V) §160(a), vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in

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*See Appendix A, 29 U. S. C. Section 157.

**See Appendix A, 29 U. S. C. Section 158(b)(1)(A).

its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. As to a somewhat comparable question considered in connection with the Railway Labor Act see *Tunstall v. Brotherhood of Locmotive Firemen*, 323 U. S. 210; *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 204-207."

In its brief *amicus* in the *Huffman* case, the Board said at page 13:

> "The Board has never had occasion to decide whether a labor organization which, acting discriminatorily within the meaning of the *Steele* case, denies job opportunities to certain employees in the bargaining unit, thereby 'restrains' or 'coerces' such employees in the exercise of a right guaranteed them by Section 7."

Four years later in the *Peerless Tool** case, the Board did decide that similar conduct constituted restraint and coercion under Section 7, and therefore violated Section 8(b)(1)(A) of the Act.

In the cited Labor Board cases, *R. K. O. Radio Pictures, Inc., Southwestern Portland Cement Co., Larus and Brothers Company, Inc.*, and *Hughes Tool Company*, the Board has afforded an administrative remedy

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**N. L. R. B. v. Die and Tool Makers, Lodge No. 113*, 231 F. 2d 298 (C A. 7, 1956) Cert. denied 352 U. S. 833; Board decision at 111 N. L. R. B. 853.

to correct discriminatory representation by labor organizations, *i.e.*, rescission of certification, apart from any remedy available under Section 8. The language of Section 9(a) of the Act speaks directly to the problem of reconciling individual and collective interests in our collective bargaining structure. *Thus, even in the absence of a finding that a specific unfair labor practice was committed, the Board has afforded an administrative remedy to correct discriminatory representation by labor organizations.*

The *Larus* case was commented upon in the hearings and debates on the 1947 (Taft-Hartley) Amendments. See House Conference Report, No. 510, on H. R. 3020. 80th Congress, p. 41. Of the cited cases, *Hughes* post dates the new amendments and the *Huffman* decisions and expressly reserves the question of whether the conduct also was violative of Section 8(b) of the Act.*

3. The decision of the Court below in the instant case is therefore in conflict with the landmark decision of this court in *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236 (1959), wherein at page 244, Mr. Justice Frankfurter, speaking for the majority, said:

> "When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by §7 of the Taft-Hartley Act, or constitute an unfair labor practice under §8, due

*Hughes Tool Company, 104 N. L. R. B. 318, 322 (1953).

regard for the federal enactment requires that state jurisdiction must yield. * * *

"When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. * * *

"In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * *

"In the light of these principles the case before us is clear. *Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of §7 and §8 of the Act, the State's jurisdiction is displaced.*" (Emphasis added).

To illustrate the endless confusion on the question of forum, remedy and law applicable, in the area of employee suits to compel arbitration, or to seek damages in lieu thereof, whether brought against employer, union, or both see Alfred W. Blumrosen's article "*Legal Protection for Critical Job Interests.*" XIII Rutgers Law Review 631 (1959). It is submitted that clarification of the pre-emption question will be a substantial step

toward order in this troubled area.* While the Blumrosen article doesn't specifically deal with the problem of pre-emption, it should be noted that it was apparently written just before this Court's decision in the *Garmon* case.**

4. The instant case involves the delicate balance between the duty a Union owes to an individual member and the duty it owes to its members collectively. It would be difficult to conceive of an area in the field of labor relations wherein the State Courts have had less experience or with which the National Labor Relations Board has greater familiarity. The Labor Board and the Courts in support thereof, have considered this problem as it has arisen in different factual settings

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*In the *Garmon* case this court said: "It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." Thus the problem presented by the instant case is not "Does the National Labor Relations Board have jurisdiction?" but rather "May it *possibly* have jurisdiction?"

**It is submitted that the activity in question is "arguably subject to Section 7 or Section 8 of the Act" and thereby satisfies the *Garmon* test. However, the conduct in question is also *clearly and indisputably* subject to Section 9 of the Act. *Hughes Tool Company*, 104 N. L. R. B. 318 (1953); *Peerless Tool Co.*, 111 N. L. R. B. 853 (1955). While the *Garmon* decision does not specifically refer to Section 9, this is obviously because Section 9 was not involved factually. As this court said in *Garmon*, at page 244: "To leave the states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

under various sub-sections of Section 8(b)* and under Section 9 of the Act.**

While there has been surprisingly little court litigation in this area, the cases thus far decided have emphasized the chaos existing in the matter of forum, remedy and law applicable.***

Professor Clyde W. Summers of Yale University Law School has recently referred to the "judicial confusion in attempting to define the rights of individual employees under a collective [bargaining] agreement":

> "The choice of policy is not left wholly at large, for the proviso of Section 9(a) of Taft-Hartley speaks directly to the problem of reconciling individual and collective interests in our collective bargaining structure * * *. The Courts, however, in deciding the cases have almost wholly ignored the policy thrust of the words and legislative history of the proviso. Instead they have seemingly

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*Under 8(b)(1)(A): *N. L. R. B. v. Die and Tool Makers Lodge No. 113, (Peerless Tool)* 231 F. 2d 298. (C. A. 7, 1956) Cert. denied 352 U. S. 833, N. L. R. B. decision at 111 N. L. R. B. 853.

Under 8(b)(1)(A) and (2): *Int. Brotherhood of Teamsters*, 94 N. L. R. B. 1494 (1951);

Under 8(b)(2) and (3): *Penello v. International Union*, 88 Fed. Supp. 935 (D.D.C., 1950) See observation regarding the *Penello* case at 65 Harvard Law Review 490, 494.

**_Hughes Tool Company_, 104 N. L. R. B. 318 (1953) and numerous earlier cases.

***As illustrative of this confusion, see the conflicting results reached in *Jorgensen v. Pennsylvania R.R. Co.*, 25 N. J. 541, 138 A. 2d 24 (1958); *Jenkins v. Wm. Schluderberg, T. J. Kurdle Co.*, 217 Md. 556, 144 A. 2d 88 (1958); *Parker v. Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959).

felt imprisoned by their self-construed theories, or have reasoned from policies declared without reference to the provisions of the federal statute."*

This observation bears on the point pressed by both Mr. Justice Douglas of this Court** and by Dean Harry Shulman*** that traditional legal methods are inappropriate to the settlement of labor relations problems. Professor Alfred W. Blumrosen emphasizes that "the claim of union and employer to freedom from judicial interjection . . . is indeed a strong one."****

In the instant case the unions were faced with a three million dollar employer damage action which arose out of the conduct of the grieving member, Guzzo, through his leading a walkout, whether or not such conduct can now be claimed to have been justified. Not only was the union faced with the problem of balancing the duty to its members as a whole against its duty to Guzzo, but the critical problem facing its members was occasioned solely by the conduct of Guzzo.

5. The *Steele* case***** (and other decisions involving its principle) was concerned with collective bargain-

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*Summers, *"Individual Rights in Collective Agreements: A Preliminary Analysis,"* 9 Buffalo Law R. 239, 241 (1960). The criterion for resolving problems in this area suggested by this Court in the *Wallace* case was derived from the purposes of established labor policy, *i.e.*, the National Labor Relations Act. *Wallace Corp. v. N. L. R. B.*, 323 U. S. 248 (1944).

***Textile Workers v. Lincoln Mills*, 353 U. S. 441 (1957).

***Shulman, *"Reason, Contract and Law in Labor Relations"* 68 Harvard Law R. 999 (1955).

****Blumrosen, *"Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy,"* XIII Rutgers Law R. 631, 640 (1959).

*****Steele v. Louisville & N. R. Co.*, 323 U. S. 204, cited in Footnote 4 of this Court's decision in the *Huffman* case, 345 U. S. 330, which footnote is herein copied *supra*, pp. 8-9.

ing representatives deriving their authority (and hence their concomitant obligations) from the Railway Labor Act.* That statute, unlike the National Labor Relations Act here involved provides no administrative remedy to an employee who is discriminated against, thus making a strong case for granting immediate judicial relief, since an employee would otherwise be without any remedy. In contrast, the administrative machinery of the National Labor Relations Act, as amended, provides adequate remedies before the National Labor Relations Board in those instances where the collective bargaining representative has breached a statutory duty. Thus the *Steele* decision, while not helpful in resolving the federal question presented here, does emphasize the desirability of resolution of such federal question at this time as it occurs in a National Labor Relations Act setting. Board procedures have neither been resorted to nor exhausted in the instant case.

A further distinction which may be drawn between the facts of the *Steele* case and the facts of the instant case is in closeness to the collective bargaining process and therefore to the functioning of unions. In the *Steele* case the discrimination was against negroes, outside the scope of legitimate bargaining activity, and in a sense irrelevant thereto.** Here the alleged discrimination relates directly to a major collective function of the union, an arbitration procedure.***

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*44 Stat. 577 (1926) as Amended, 45 U.S.C., Section 151 *et seq.*, (1946).

**See *Kordewick v. Bro. of Railroad Trainmen* (C. A. 7, 1950), 181 F. 2d 963, 966.

***Ostrofsky v. United Steelworkers of America* (D.C.D. Md., 1959), 171 Fed. Supp. 782, 790.

Clearly, the federal question presented is of major importance in the administration of the National Labor Relations Act. The *Blumrosen* and *Summers* articles, *supra,* both emphasize the near-total chaos in the law in this area. Where state courts have entertained jurisdiction in these cases they "have almost uniformly applied state laws in determining the status of the individual under the collective bargaining agreement without any discussion of what law should apply. Under *Textile Workers v. Lincoln Mills,* 353 U. S. 448, 77 S. Ct. 912 (1957), the rights between the union and the employer are governed by federal substantive law. It would be anomalous, not to say awkward, if the rights of the individual were to be governed by a different and perhaps conflicting body of state law."* Here is threatened a regulation of unions by state court-established standards that will prohibit union agents "from functioning as collective bargaining agents . . . except upon conditions fixed by** state law.

Conclusion.

For the foregiong reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JEROME SMITH,
EUGENE S. IVES,
Counsel for Petitioners.

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*Summers, *"Individual Rights in Collective Agreements: A Preliminary Analysis,"* 9 Buffalo Law R. 239, 241 (1960).

**Hill v. Florida,* 325 U. S. 538 (1945).

APPENDIX A.

Pertinent Statutory Provisions.

National Labor Relations Act, 61 Stat. 140 ff. 29 U. S. C. Section 157, Section 158(b)(1), Section 159(a) and Section 160(a):

"157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(d) of this title. As amended June 23, 1947, 3:17 p. m. E. D. T. c. 120, Title I, 101, 61 Stat. 140."

"158. Unfair Labor practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the section of his representatives for the purposes of collective bargaining or the adjustment of grievances."

"159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment."

"160. Preventing of unfair labor practices—Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been, or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such

agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this sub-chapter or has received a construction inconsistent therewith."

APPENDIX B.

Memorandum of Decision Upon Overuling of: Objection; Demurrers to Sixth Amended Complaint; in Action by Member of Union vs. Union and Dual Counsel, for Damages for Alleged Breach of Duty as Agents, in Dismissing Proceedings for Arbitration of Grievance of Plaintiff vs. His Employer, in Exchange for Release of Liability.

In the Superior Court of the State of California in and for the County of Los Angeles.

Anthony J. Guzzo, Plaintiff, vs. United Steelworkers of America, an international union, affiliated with the AFL-CIO; United Steelworkers of America, District 38, an unincorporated association, affiliated with the AFL-CIO, et al.; Algerdas N. Cheleden, defendants. No. 687391.

Appearances: Gyler and Gottlieb, by Emanuel Gyler, for Plaintiff; Nutter & Smith for all Defendants other than Algerdas N. Cheleden; Eugene S. Ives for Algerdas N. Cheleden.

(Proceedings)

To Plaintiff's Sixth Amended Complaint, (hereinafter designated as "Complaint") for damages for: "Breach of fiduciary relationship; Intentional breach of attorney-client relationship; Malpractice, Conspiracy" (the First and Second Causes of Action being alleged against all Defendants except Algerdas N. Cheleden, sometimes hereinafter for purposes of brevity designated as "Cheleden"; the Third and Fourth Causes of Action against Cheleden alone; the Fifth Cause of Action against all Defendants); the Defendant Unions'

Officers thereof (jointly and severally sometimes hereinafter designated as "Unions") and Cheleden filed their Demurrers, general and special, Motions To Strike and Objections To Jurisdiction Of This Court; the latter predicated upon the premise that the "Cause of Action" attempted to be alleged constituted Unfair Labor Practices under the Labor Management Relations Act, as amended, . . . particularly Sections 8(a)(1) and (3) and 8(b) (1) and (2) thereof and, therefore, this Court has no jurisdiction thereover. (The said Labor Management Relations Act as amended hereinafter, for purposes of brevity, designated as L. M. R. A.

The Complaint in substance alleges:

(Summary of Facts alleged in Complaint)

1. That between May 8, 1947 and April 2, 1956, Plaintiff was employed by the Southwest Steel Rolling Mills (sometimes hereinafter designated as "Southwest"), which was engaged in interstate commerce.

2. On September 23, 1954, Unions entered into a Collective Bargaining Agreement (sometimes hereinafter designated as "C. B. A.") with Southwest for a term commencing August 1, 1956, and thereafter until terminated. That C. B. A. is still in full force and effect.

3. C. B. A. (Exhibit A of the Fourth Amended Complaint) is "by and between the Southwest Steel Rolling Mills, a corporation . . . and the United Steelworkers of America, on behalf of the members of Local Union No. 2018", hereinafter called "the Union". Section 1 is entitled "Recognition"; Section 2, "Management"; Section 6, "Grievances"; Section 7, "Concil-

iation and Arbitration"; Section 8, "Discharge Cases"; Section 18, "No Strikes and Lockouts"; Section 21, "Amendment or Termination".

By the provisions of Section 8: Southwest agreed that a member of Union shall not be pre-emptorily discharged; that in all instances in which Management may conclude that employees' conduct may justify suspension, such suspension shall not be more than five calendar days; that during said period of initial suspension the "employee may, if he believes that he has been unjustly dealt with," request a hearing and a statement of the offense before the foreman, or the Industrial Relations Director, with at least four members of the Grievance Committee present, "as the employee may choose"; after such hearing, Management may determine whether the suspension shall be converted into discharge; in the event the suspension shall result in a discharge of the employee, "the employee may, within five days after such disposition, allege a grievance which shall be handled with the procedure for adjustment of grievances starting with Step 2. . . . Should it be determined by the Company or by an Arbitrator, in accordance with the grievance procedure, that the employee has been suspended unjustly, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for time lost".

By the provisions of Section 2, the Company "is vested with the exclusive right to direct the working forces and to hire, suspend, lay off because of lack of work, promote, demote, transfer, increase and decrease working forces, or discharge employees for violation of rules, inefficiency, insubordination or other legitimate reasons provided, that this will not be used for pur-

poses of discrimination against any employee for authorized Union activities, and that any action taken does not conflict with any other provision of this Agreement".

4. That Plaintiff's employment was for a term in accordance with the C. B. A.; that said contract regulated his services, hours and other conditions of employment.

5. On April 2, 1956, and prior thereto, Plaintiff earned an average wage of $235. per week, and would have continued to earn such sum had his employment continued.

6. That Plaintiff had performed all of his duties in a satisfactory manner, no cause for discharge existed, and he would have continued so to do.

7. On September 24, 1954, Unions adopted a Constitution (Exhibit B of the Fourth Amended Complaint).

The Constitution, in part, provides:

(i) (Article XVII, Sec. 1) "The International Union shall be the contracting party in all collective bargaining agreements, and all such agreements shall be signed by the International Officers."

(ii) (Article XVII, Sec. 3) "The International Union and the Local Union to which the member belongs shall act exclusively as his agent to represent him in the presentation, maintenance, adjustment and settlement of all grievances and other matters relating to terms and conditions of employment or arising out of the employer-employee relationship."

(iii) (Article VII, Sec. 9) "The Local Union shall be charged with the duty of enforcing the Constitution as affecting their membership."

(iv) (Article XII, Sec. 1, in part) "Any member may be penalized for committing any one or more of the following offenses: . . . (c) instituting, or urging or advocating that a member of any Local Union institute action in a court against the International Union or any of its officers or against a Local Union or any of its officers without first exhausting all remedies through the forms of appeal of the International Union."

(v) (Article XII, Sec. 2) "Any member convicted of any one or more of the above offenses may be fined, suspended or expelled."

(vi) (Article XIII, entitled "Trials of Members and Local Union Officers") Section 1 provides that any charge against a member must be submitted in writing. Section 2 provides for a copy to the accused member, together with written notice of time and place of the hearing. Section 3 provides for a Trial Committee. Section 4 provides for the Trial Committee to report its findings through a meeting of the Local Union. Section 6 provides: "The accused or the accuser may appeal to the International Executive Board and thereafter to the next regular International Convention provided that he files notice of appeal with the International Secretary-Treasurer within thirty days after notice of the decision of the Local Union or the International Executive Board from which the appeal is taken. . . . The Executive Board, in its discretion, may in reversing a decision order a Local Union to compensate

an individual member for any loss incurred as a result of said decision."

(vii) (Article XVII, Sec. 4) "No officer, member, representative or agent of the International Union or of any Local Union or of any subordinate body of the International Union shall have the power or authority to counsel, cause, initiate, participate in or ratify any action which constitutes a breach of any collective bargaining contract duly entered into."

8. That at all times concerned Plaintiff was a member of Unions. That Unions were the agents of Plaintiff to enforce the terms of the C. B. A. for the benefit of Plaintiff.

9. On February 15, 1956, the C. B. A existed between the Union and Southwest. Unions called a strike; Plaintiff participated therein as a member of the Union; the strike continued until on or about March 25, 1956.

10. On March 15, 1956, Southwest commenced an action, in the District Court of the United States, Southern District of California, against the Unions and Plaintiff (19678 W. M.) under Sec. 301(a) of the L. M. R. A., for damages for alleged violation of the C. B. A.

11. On March 27, 1956, Southwest, wrongfully and without cause, suspended Plaintiff for participating in the strike; on April 2, 1956, it, wrongfully and without cause, discharged him.

12. That said suspension and discharge by Southwest was by reason of Plaintiff's participation in the strike, and done for the purpose of discriminatory interference, restraint and coercion, in violation of the

C. B. A. No other member of the Union who participated in the strike was discharged.

13. On April 4, 1956, pursuant to the C. B. A., Plaintiff filed a written grievance in accordance with Section 2 of the Grievance Procedure.

Thereupon meetings were held between the Union on behalf of the Plaintiff, and Southwest.

On April 25, 1956, Unions notified Southwest pursuant to Step 5 of the Grievance Procedures, that they were unable to settle Plaintiff's grievances and requested that the dispute be referred to arbitration.

14. Between April 25 and May 1, 1956, Unions and Southwest agreed to have the dispute concerning Plaintiff's grievance decided by a single arbitrator rather than three arbitrators as provided by the C. B. A.

15. On May 1, 1956, Unions and Southwest being unable to agree on a single arbitrator, Unions requested the American Arbitration Association to designate an impartial arbitrator; the proceeding was assigned Case No. LA-23-56.

16. On May 16, 1956, Southwest filed a complaint for an injunction (No. 660529 of this Court) to enjoin American Arbitration Association, Unions and Plaintiff from proceeding with the arbitration proceedings.

17. That Unions promised and agreed with Plaintiff that Unions would pursue Plaintiff's arbitration case against Southwest until he was restored to his employment with Southwest, together with back pay. In consideration of and in reliance thereupon Plaintiff did not pursue the legal right which he believed existed in his favor under the L. R. M. A.

18. Between October, 1956 and May 22, 1957, Unions and Cheleden, without the knowledge or consent of Plaintiff, negotiated with Southwest an agreement for the dismissal of the action by Southwest against the Union and Plaintiff, for damages under Section 301(a) of L. M. R. A., in consideration of a dismissal of the proceeding for arbitration before the American Arbitration Association; that said proceedings were, without Plaintiff's knowledge or consent, dismissed.

19. The dismissals were for the benefit of and to secure a personal advantage to Unions in that it released them of any liability for damages to Southwest; the dismissal of the arbitration proceeding being solely for the purpose of enabling Unions to get for themselves a dismissal of the action for damages against them.

That the dismissals were of no benefit to, but on the contrary detrimental to, Plaintiff in that it prevented Plaintiff from being reinstated to his former employment with Southwest, together with back pay.

That Plaintiff was not liable to Southwest for any damages in the said action under Sec. 301(a) of the L. M. R. A.; that Unions and Cheleden so knew; Unions were liable for damages therein and knew thereof; neither Unions nor Cheleden advised Plaintiff thereof.

20. That if Unions and Cheleden had not dismissed the arbitration proceeding and had defended the action of Southwest for injunction thereagainst; an award would have been rendered in Plaintiff's favor due to "plaintiff having been discriminatorily discharged without cause for authorized Union activities"; and Plain-

tiff would have been reinstated to his former employment, with back wages.

21. That the Constitution of the Unon (Exhibit A of the Fourth Amended Complaint) does not provide Plaintiff with any internal administrative remedy. (The Court has examined the Constitution. The only provision which could be possibly applicable to or create any internal administrative remedies are Article XII —"Discipline," and Article XIII—"Trial of Members and Local Union Officers" (—the provisions thereof are hereinbefore set forth).) No allegation is made in the Complaint that any proceeding was at any time taken by Unions against Plaintiff. Subparagraph (c) of Sec. 1 of Article XII provides for the disciplining of a member for instituting action in the Court "without first exhausting all remedies through the forms of appeal of the International Union". No appeal is provided for excepting only in the event of the disciplining of a member charged under Article XII and tried under Article XIII. There is no provision in the Constitution for the filing by a member of any charge against the Unions or for any trial thereof or for any appeal therefrom. The Executive Board is only granted discretion to "in reversing a decision order a Local Union to compensate an individual member for any loss incurred as a result of said decision". (Article XIII, Sec. 6.) The "decision" referred to therein is a decision of a Trial Committee under Article XIII upon any "charges against a member or a Local Union Officer". (Article XIII, Sec. 1.)

22. That at all times concerned Cheleden was and now is a lawyer. That Plaintiff and all other members of the Local Union paid monthly dues out of which

the Unions paid 10 cents per member per month to Cheleden as a retainer fee for his representation of the Local Union and its members, including Plaintiff, in the litigation hereinbefore set forth.

23. That Cheleden was employed by Plaintiff and the Unions to, and he agreed to, represent them in said litigation. That he appeared of record for Plaintiff in all of said litigation. That Unions agreed to pay Cheleden's compensation therefor in addition to the retainer fee.

24. That Cheleden, in order to gain an advantage for Unions, to the detriment of Plaintiff, negotiated the dismissals of the action by Southwest against Unions and Plaintiff for damages under Sec. 301(a) of L. M. R. A., and in consideration thereof dismissed arbitration proceedings instituted in behalf of Plaintiff. That Cheleden was aware of conflicting interests between Plaintiff and Unions in so doing; that Cheleden at no time advised Plaintiff thereof, nor was Plaintiff aware thereof.

25. That by reason of Defendants' breach of duty owing to Plaintiff, Plaintiff suffered a loss of wages and will continue to suffer loss of earnings.

26. That Unions and Cheleden acted in an oppressive, willful and malicious manner with intent to harass Plaintiff.

27. That Unions and Cheleden conspired together in the doing of said alleged wrongful acts for the purpose of avoiding Unions' liability for damages, and to prevent Plaintiff from being reinstated to his former employment.

(Law)

I. State Courts have jurisdiction over an action for damages by a member of a Union against the Union for breach of duty owed by it to its member, which duty is created by contract, express and implied by law. In the representation of such member in grievance procedures, under a Collective Bargaining Agreement, expressly negotiated in behalf of the Local Union to which the member belonged, the Union being expressly designated and constituted by the Constitution of the Union, the agent of the member for such purposes, the Union is bound and required to exercise good faith and that degree of care and judgment required of agents generally, and not to destroy such member's rights of reinstatement to and continued employment by a release thereof for the gain, benefit and protection of the Union against liability to the member's employer by reason of wrongful acts on the part of the Union. The rights, damages for the breach of which are sought, were not created by the L. M. R. A., but rather by the contract between the Unions and Plaintiff, as embodied in the Constitution and as implied therein, if not created, by law. (McCarroll vs. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, at pages 58, 59, 63, 64; 355 U. S. 932; 2 Law Ed. 2d 415; 78 Sup. Ct. 413; Harris vs. National Union of Marine Cooks and Stewards, 98 Cal. App. 2d 733, 736.)

I-1 The action against Unions being for damages for alleged breach of duty as the agent of Plaintiff, a member of the Union, in grievance and arbitration proceedings against the employer for alleged breach by the employer of the Collective Bargaining Agreement, the duty on the part of Unions arising by the contract be-

tween it and Plaintiff, a member, as expressed and implied by law, embodied in the Constitution of the Union, the fact that the results of the alleged breach of duty on the part of the Unions might also and incidentally constitute an unfair labor practice under the L. M. R. A. on the part of the Union, or even on the part of the employer, does not divest this Court of jurisdiction of the said action. (Allen vs. Los Angeles County District Council of Carpenters, 51 Cal. 2d 805, 810-811; Harris v. National Union of Marine Cooks & Stewards, 98 Cal. App. 2d 733, 736; Gonzales v. International Association of Machinists, 142 Cal. App. 2d 207, 218; Taylor vs. Marine Cooks & Stewards Assn., 117 Cal. App. 2d 556, 564.)

I.2 There is a distinction between a Union's statutory authority, duty and liability as the Certified Collective Bargaining Representative under the L. M. R. A., and its contractual authority, duty and liability to its members. The former are publicly created, authority, duty and liability created, derived from, based upon and imposed by the L. M. R. A. (Local Union No. 12, et al. vs. N. L. R. B., 189 Fed. 2d, 1-5; Certiorari denied: 342 U. S. 868; 72 Sup. Ct. 109; 96 Law Ed. 653.) The latter are private contractual authority, duty and liability created, derived from, based upon, and imposed by the contract existing between Unions and Plaintiff as a member, embodied in its Constitution and the C. B. A., insofar as it was entered into by Unions for and on behalf of Plaintiff as a member of the Local. (Sellers vs. Local No. 174, Joint Council No. 28 of the International Brotherhood of Teamsters, 314 Pac. 2d, 456, 459, 461, 463; Certiorari denied 78 Sup. Ct. 1134, 346 U. S. 945; rehearing denied: 79

Sup. Ct. 14, 358 U. S. 860; United Construction Workers, et al., vs. Laburnum Construction Corp., 347 U. S. 7, 565; 74 Sup. Ct. 853; 78 Law. Ed. 1025; cited in Garmon vs. San Diego Bldg. Trades Council, 49 Cal. 2d 595; at 603-4-5.)

(i) Hence seniority rights arising under a Collective Bargaining Agreement are the "exclusive property of the individual employees. They are property within the Fifth Amendment of the United States Constitution". (Primakow vs. Railway Express Agency, 56 Fed. Supp. 413-416.)

(ii) Therefore, substantive rights created by Collective Bargaining Agreements may be enforced by and are within the jurisdiction of State Courts even though the breach of the contract in regard thereto may constitute also an unfair labor practice within the meaning of the L. M. R. A. (Textile Workers Union of America vs. Arista Mills, 193 Fed. 2d 529-533, 534, cited in McCarroll vs. Los Angeles County Dist. Council of Carpenters, 45 Cal. 2d 45-57; Haleston Drug Stores, Inc. vs. N. L. R. B., 187 Fed. 2d 418-420) United Electrical, etc., et al. vs. General Electric Co., 231 Fed. 2d 259-261.) The fundamental basis of the causes of action is the violation of duty; the collateral allegations that the discharge was an unfair labor practice does not transform the action to enforce the duty of Defendants to Plaintiff created by the relationships existing, into a labor dispute or into an action to restrain unfair labor practices in commerce within the exclusive jurisdiction of the N. L. R. B. (Anchor Motor Freight vs. Local Union No. 445, 171 N. Y. Supp. 2d 511, citing McCarroll vs. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45-57; As-

sociation of Westinghouse Salaried Employees vs. Westinghouse Electric Corp., 99 Law Ed. 510-519, 523-24, 525, 348 U. S. 437, 75 Sup. Ct. 481; International Union, etc. vs. Russell, 356 U. S. 634, 78 Sup. Ct. 932, 2 Law Ed. 2d. 1031; International Assn., etc. vs. Gonzales, 356 U. S. 617, 78 Sup. Ct. 923, 2 Law Ed. 2d 1018, 46 A. L. R. 2d 1126.)

(iii) Therefore, a State Court has jurisdiction of an action by employees to have an arbitration award under a Collective Bargaining Agreement declared null and void. (Clark vs. Hein-Werner Corp. vs. International Association of Machinists, etc. [Sup. Ct. Wisc.], 99 N. W. 2d 132.)

I.3 This is not an action for damages for breach of a Collective Bargaining Agreement within Sec. 301(a) of the L. M. R. A., but rather for damages for breach of the duty owed by an agent to its principal, and hence, Textile Workers vs. Lincoln Mills, 353 U. S. 444, 77 Sup. Ct. 912, 1 Law Ed. 2d 972; Garner vs. Teamsters, etc., 346 U. S. 485, 74 Sup. Ct. 161, 98 Law Ed. 228; Weber vs. Anheuser-Busch, 348 U. S. 468; 75 Sup. Ct. 480, 99 Law Ed. 546; are not applicable.

(a) Plaintiff's right to damages is created, exists under and is limited by the laws of our State, independently of, not predicated upon or created by the L. M. R. A. Assuming, as we must, the truth of the allegations of the complaint of breach of duty with consequent loss of earnings, the existence of a cause of action is clear. The liability of an agent to his principal is determined in accordance with the principles of the general law of contracts. (Dotson vs. International Alliance of Theatrical Stage Employes,

34 Cal. 2d 362-374, 375; Smetherham vs. Laundry Workers' Union, Local No. 75, 44 Cal. App. 2d 131-139; Harris vs. National Union of Marine Cooks & Stewards, 98 Cal. App. 2d 733, 738; Anderson vs. Badger, 84 Cal. App. 2d 736.)

(b) The following statements of our District Court of Appeal, in International Sound Technicians vs. Superior Court, 141 Cal. App. 2d 23, at pages 29, 30 and 31 (hearing denied by Supreme Court), are applicable hereto:

"We think, however, that the remaining causes of action present a different question. By them, Fullerton seeks damages for the wrongful act of the defendant Union in depriving him of his means of livelihood. He does not seek preventive relief but only redress for a wrong done him in depriving him of his common-law and constitutional right to pursue his chosen occupation and thus gain his livelihood.

"Fullerton's right to work is a right guaranteed him by the federal Constitution as well as by the Constitution of this state (14th Amend., U. S. Const.; Cal. Const., Art. I, §§ 1 and 13; Bautista vs. Jones, 25 Cal. 2d 746, 749 [155 p. 2d 343]; James v. Marinship Corp., 25 Cal. 2d 721, 731, 733 [155 P. 2d 329, 160 A. L. R. 900])."

It is noted that said International Sound Technicians vs. Superior Court is cited in and relied upon in, Jones vs. American President Lines, Ltd., 149 Cal. App. 2d 319, 323 (holding that the Courts of this State have jurisdiction of a wrongful invasion of an employee's right to work, even though the invasion also constitutes an unfair labor practice), and is cited in the majority opinion of Garmon vs. San Diego Bldg.

Trades Council, 49 Cal. 2d 595 at 617, as still being law, but is stated in the dissenting opinion of Justice Traynor in Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629 at 638, as no longer being law; and this Judge is aware that Garmon v. San Diego Bldg. Trades Council is as to other points overruled in Petri Cleaners, Inc. v. Automotive Employees, etc. (Jan. 1960), 53 A C 460 at 480.

Regretfully, therefore, all this Judge can do is to make a hoped for and relatively informed "guess", based upon the law as it purports to exist and as best he can understand it. If this Judge were concerned only about affirmations or reversals on appeal, of his rulings, and based solely upon the proposition that Justice Traynor was a part of the majority in Petri Cleaners, etc., this Judge would "play craps" with the rights of the parties hereto and guess, and therefore rule, that the statement of Justice Traynor that International Sound Technicians, etc. is no longer the law will prevail. Such attempts to base or determine or rule upon the legal rights of parties are and always shall be abhored by those of us who believe: that Justice can only exist under law; that the rights of the people should not be legislated by the judiciary; and that it is the solemn and bounden duty of every Judge, at least of every inferior court, to diligently and studiously attempt to ascertain the law and declare and apply it as logically, intellectually honestly and informedly as he can. It is to be regretted that it is not allowed to us, the Trial Judges, to be able to determine the law with that reasonable certainty that the administration of law, and administration of hoped for justice, requires. The solution is, however, and forever to be regretted, not within our power.

II. Though Unions had control over Grievance Procedures under the Collective Bargaining Agreement, there was, is and must be implied a covenant and duty of fair representation of good faith and fair dealing, so as not to deprive the employees of the fruits of the Collective Bargaining Agreement. This is true whether the employees be viewed as: third party beneficiaries of the C. B. A. (C. C. 1559; Biakanja vs. Irving, 49 Cal. 2d 647-650; Division of Labor Law Enforcement vs. Dennis, 81 Cal. App. 2d 306-309; Leahy vs. Smith, 137 Cal. App. 2d Supp. 884; Sublett vs. Henry's Turk & Taylor Lunch, 21 Cal. 2d 273; Mayers vs. Loew's, Inc., 35 Cal. 2d 822; Marranzano vs. Riggs National Bank, 184 Fed. 2d 309-350, cited in footnote as existing law in Association, etc. vs. Westinghouse, 98 Law Ed. 510, 525); or in the position of beneficiaries of a trust in which the Unions as Trustees owed them a fiduciary obligation as an agent. (CC 2306, 2228, 2234, 2322; Brogdex Co. vs. Walcott, 123 Cal. App. 2d 575; Clark vs. Hein-Werner Corp., 99 N. W. 132-136; Soto vs. Lenscraft Optical Corp., 180 N. Y. Supp. 2d 388); or under the conception of due process of law; Plaintiff's right of employment under the C. B. A., negotiated in his behalf by the Union as his agent, was a valuable property right of which he could not be divested by the Union without due process. (Estes vs. Union, etc., 89 Fed. 2d 768.) It must therefore follow that the breach of such duty gave rise to a cause of action in tort (Eads vs. Marks, 39 Cal. 2d 807-811) which, though incidentally involving an unfair labor practice, exists independently therefrom, and is not predicated thereon nor created thereby.

(i) The Constitution, Rules and By-Laws of the Union, constituted a contract between the Union and its members, including Plaintiff, as to the rights and duties of the members to the Union, and of the Union to its members. (Weber vs. Marine Cook's & Stewards' Assn., 93 Cal. App. 2d 327-334.)

(ii) In every contract there are implied covenants of good faith and fair and honest dealing, and that neither party will do anything which will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract. (Brogdex Co. vs. Walcott, 123 Cal. App. 2d 575; Universal Sales Corp. vs. California Press Mfg. Co., 20 Cal. 2d 751; Nelson vs. Abraham, 29 Cal. 2d 745.) Everything implied in a written contract is as much a part of it as though it were expressed in writing. (DuBrutz vs. Bank of Visalia, 4 Cal. App. 201; Peterson vs. Chaix, 5 Cal. App. 525.)

(iii) The provisions of the Constitution (Article XVII, Sec. 1 and Sec. 3; Article VII, Sec. 4, and the entering into of the C. B. A. by Unions "on behalf of the members of Local Union No. 2018", created and constituted the Unions the agent of Plaintiff to represent him in enforcing the provisions of the C. B. A. for his benefit. (CC 2295.) An agent can never have authority to do an act which is a fraud upon the principal (CC 2306); no authority, however broad, authorizes an agent to do an act which a trustee is forbidden to do (CC 2322-3); he is a trustee, a fiduciary charged with the duty of honesty, loyalty, the strictest integrity and faithfulness, and the violation thereof is a fraud against his principal. (CC 2234; CC 1573-1; Kinert vs. Wright, 81 Cal. App. 2d 919; Hickson vs. Gray,

91 Cal. App. 2d 684; Leimert Co. vs. Woodson, 125 Cal. App. 2d 186; Ramey vs. Meyers, 159 Cal. App. 2d 82; Darrow vs. Klein, 111 Cal. App. 310; Vol. I. McKinney's New California Digest, pp. 768 et seq., particularly 770.) Under the allegations, Defendants being agents of the Plaintiff, in all matters connected with each of their agencies, each was: bound to act in the highest good faith toward Plaintiff (CC 2228); could not use or deal with Plaintiff's rights for the Union's own benefit (CC 2229); could not take part in any transaction in which they, or either of them, or as to Cheleden or anyone for whom he acted had an interest, present or contingent, adverse to that of Plaintiff (CC 2230); excepting only as Plaintiff with a full knowledge of their and each of their motives and of all of the facts concerning the transactions which might affect their own disposition, and without the use of any influence on the part of Defendants, permitted them to so do. (CC 2230-1.) Every violation of said duties on the part of the agent was a fraud against Plaintiff. (CC 2234, 1573-1.)

(a) The necessity and importance of the foregoing principles are demonstrated herein. Accepting as we must, for the purposes hereof, the truth of the allegations of the Complaint: Unions for its benefit to avoid and relieve itself from any possible liability for damages to Southwest for breach of the C. B. A., without consultation with, knowledge or consent of Plaintiff, without giving him an opportunity of asserting and protecting his rights under the C. B. A., by withdrawing and dismissing the proceedings for the adjudication and enforcement of his rights under the C. B. A., and reinstatement to his employment, placed him in a position where he can no longer be employed

and destroyed his opportunity for employment, in the occupation and field, to wit, the steel industry, in which he had been engaged for a long number of years. It is common knowledge, of which this Court can take judicial notice, that no employer will employ an employee discharged by another for and agreed by his Union to be a trouble maker, agitator and a leader of "quickie" strikes.

(iv) Under the circumstances it cannot be contended that the decision of the Union to dismiss the arbitration proceedings was conclusive and binding upon Plaintiff. The substantial interests of Unions, not being the same as, but contrary to the interests of, Plaintiff, whom it purported to represent, due process would and should prevent giving the decisions of Unions any effect upon Plaintiff. (Hansberry vs. Lee, 311 U. S. 62, 61 Sup. Ct. 115, 85 Law Ed. 22; 132 A. L. R. 741; Clark vs. Hein-Werner Corp., 99 N. W. 2d 132, 138.) The burden shifts to the Defendants to show affirmatively that they acted in good faith, fairly and honestly, and for the best interests of Plaintiff. (Bell vs. Scudder, 78 Cal. App. 2d 448; Schwarting vs. Artel, 40 Cal. App. 2d 433; Cisco vs. Van Lew, 60 Cal. App. 2d 575.) Defendants' contention that it was for the best interests of Unions as a whole, and for the remaining members of Unions employed at Southwest, that the "deal" be made, does not constitute justification or render the Complaint insufficient to state a cause of action, particularly in face of the allegation of Unions' bad faith. If a Union can have the right to sacrifice the rights of a member, it could only exist in the exercise of the highest good faith for the benefit of the whole. In a democracy, and an unincorporated voluntary association such as a Union, especially when

one cannot work in an industry except by membership therein, it is or should be, and the law holds, and should hold it, to the obligations of a democracy, the rights of the whole of the membership is the sum total of the rights of each individual thereof. Only as the Unions in good faith exercise the care owed by them to each of its members, do all have the same rights. "The right to earn a living is deemed to be property within the concept of the Fifth Amendment to the federal Constitution, and a union, in the service of its interest, may not deprive a person of its constitutional rights of liberty and property." (DeMille vs. American Federation of Radio Artists, 31 Cal. 2d 139, 153.)

(v) Whether Unions performed its duty toward Plaintiff in the arbitration proceedings, and the subsequent litigation involved herein, under any circumstances presents a question of fact. Assuming, however, the truth of the allegations of the Complaint and therefore that the interests of Unions and of Plaintiff became diametrically opposed to each other, and that Unions espoused its own selfish interests for its own protection, to the detriment and loss of its member, Plaintiff, and without giving him the opportunity of protecting his interest as a matter of law, there is alleged a breach by Unions of its duty owed to Plaintiff. (Clark vs. Hein-Werner, et al., 99 N. W. 2d 132, 137.)

Nor does Garner vs. KMTR Radio Corp., 146 Cal. App. 2d 441, hold to the contrary, for the Court therein states (page 443) it is "not suggested in plaintiff's briefs that the Union did not make a complete and fair investigation, or that its decision was unjust in any respect".

(vi) It is true that cases of this character present a rather difficult problem in the matter of allegation, proof and assessment of damages, and it may be difficult to determine how certain the employment of Plaintiff would have been and in what classification he would have been employed if he had prevailed in the arbitration and his re-employment procured. The Defendants, however, are in no position to complain thereof. "One whose wrongful conduct has rendered difficult the ascertaining of damages, cannot escape liability because the damages could not be measured with exactness." (Hopson vs. National Union of Marine Cooks & Stewards, 116 Cal. App. 2d 320-327.)

III. Plainitff's Cause of Action is not barred by reason of alleged failure to exhaust the International Administrative Remedies within the Union.

(i) No provision of the Constitution provides for the asserting by Plaintiff, or any member similarly situated, of the claim involved herein, to wit, of damages for breach of Unions' said contractual, express and implied by law, duties to him. (Hopson vs. National Union of Marine Cooks & Stewards, 116 Cal. App. 2d 320-327.)

(ii) Additionally, when a Union has violated its own laws and wrongfully violated a member's property rights, the rule of exhaustion of internal administrative remedies within Unions are not applicable. (Harris vs. National Union of Marine Cooks & Stewards, 98 Cal. App. 2d 733; Simpson vs. Salvation Army, 49 Cal. App. 2d 371-375; Perko vs. Local Union No. 207, 168 Ohio State 161; 151 N. E. 2d 742.)

(iii) Defendants rely heavily upon Terrell vs. Local Lodge 758, International Assn. of Machinists, 150 Cal.

App. 2d 24. That decision, however, this Judge respectfully submits, is not controlling for the following reasons, among others: (1) The appeal was from a Judgment after granting a Motion for Summary Judgment, and it is noted that the appellant appeared in pro per; and (2) The Constitution of the Grand Lodge, upon which the Plaintiff relied, did not constitute the Grand Lodge the agent of the member by merely reciting "aims" (page 26); and (3) The affidavit of the Plaintiff therein did not support the allegations of the Complaint. The Court stated (page 28): "The counter-affidavit of plaintiff does not controvert the facts stated in the affidavits of Mr. Klein and Mr. Bogardus. It appears from the counteraffidavit that plaintiff relies on the documents referred to by him in his deposition and related by Mr. Klein, i.e., his application for membership in Union, the constitution of the Grand Lodge, and the collective bargaining agreement. In no one of these did Union agree to process plaintiff's greivance through Step four—arbitration. The application for membership does not contain any promise to do anything with respect to grievance procedure. Assuming the constitution of the Grand Lodge can be construed as an agreement between Union and plaintiff, it contains nothing obligating Union to process grievances. It merely states that Grand Lodge 'aims' to settle disputes between members and employers."; and (4) The case did not involve a failure to pursue grievance procedures for the personal gain and benefit of the Union, or a breach of fiduciary relationship; and (5) Therein the Union exercised its discretion admittedly, appellant making no claim to the contrary, in good faith. (See Terrell vs. Local Lodge 758, International Assn. of Machinists, 141 Cal. App. 2d 17, 22.)

It is noted that no petition for hearing in the Supreme Court was made of the decision reported in 150 Cal. App. 2d 24.

IV. Cheleden, having undertaken to represent the interests of Plaintiff, became his attorney, and the attorney-client relationship existed. The fact that there was no formal arrangement is immaterial. (Brydonjack vs. Rieck, 5 Cal. App. 2d 219.) The consent on the part of Plaintiff to Cheleden representing the Union and himself was not a consent to representation of both from and after the time when a conflict of interests arose, and when that conflict of interests between the Union and Plaintiff arose it was his duty to withdraw—as counsel for both. A consent by a client to representation by an attorney of dual interests is not a consent to representation of conflicting interests. Consent to representation of conflicting interests requires express consent after a full disclosure by counsel of all of the facts. Dual representation becomes a representation of conflicting interests when, in behalf of one client, it becomes the duty of the lawyer to contend for that which his duty to the other client requires him to oppose. (Canon 6, Canons of Professional Ethics of the American Bar Association; Rules 4, 5 and 7 of Rules of Professional Conduct, State of California.)

IV.1 Though Cheleden was entitled to and could represent the Union and Plaintiff, a dual representation, up to the point and time when their interests became opposed to each other, at that point and time he was under any circumstances bound, as a minimum, to advise Plaintiff of the conflict of interests and of the instructions of the Union to dismiss the arbitration

proceedings so as to enable Plaintiff to procure other representation or take such proceedings and action as he might be advised for the protection of his rights and Cheleden was prohibited by law from dismissing the arbitration proceedings so as to affect or destroy Plaintiff's rights; Cheleden, too, owed the duty of a fiduciary to Plaintiff. (Arden vs. State Bar, 52 A. C. 322, 331; Hiner vs. Olson, 23 Cal. App. 2d 227; Cisco vs. Van Low, 60 Cal. App. 2d 575; Anderson vs. Thatcher, 76 Cal. App. 2d 50.) As a fiduciary Cheleden was bound to the most conscientious fidelity to Plaintiff. (Cox vs. Delmas, 99 Cal. 104; Pennix vs. Winton, 61 Cal. App. 2d 761; McClure vs. Donovan, 82 Cal. App. 2d 664; Hammett vs. McIntyre, 114 Cal. App. 2d 148.)

(a) An attorney may be liable for negligence (Fourth Cause of Action; Gambert vs. Hart, 44 Cal. 542; In re Kruger Estate, No. 130621; Brock vs. Fouchy, 76 Cal. App. 2d 363; Pete vs. Henderson, 124 Cal. App. 2d 487) or for fraud: (Third Cause of Action; CC §§2306, 2322, 2228, 2230, 2232, 2233, 2234, 1573-1; American Box & Drum vs. Harron, 44 Cal. App. 2d 370, 373-375.)

V. The Complaint alleging causes of action for damages for the breach of duty owing by Unions and by Cheleden unto him, and alleging an agreement on the part of both so to do, and the participation of both therein, so that both were joint tort feasors, both Defendants are liable therefor and the Cause of Action (Fifth) for alleged conspiracy therefore alleges facts sufficient to constitute a cause of action. (Proctor vs. Arakelian, 208 Cal. 82, 95; De Vries vs. Brumback 53 A. C. 649.)

VI. The allegations as to the claimed liability for punitive damages are sufficient. "Where a complaint pleads the deliberate commission of an unlawful act for the purpose of injuring another, it pleads the only facts necessary to put in play the conclusive presumptions of a malicious and guilty intent." (Morgan vs. French, 70 Cal. App. 2d 785, 789; CC §3294.)

(Order)

It is therefore ordered:

I. That the objections of the Defendants to the jurisdiction of this Court of and over the causes of action, and each thereof, pleaded in the Complaint are overruled.

II. That the demurrers of the Defendants, and each of them, to the Complaint, are overruled.

III. That the motions to strike of the Defendants, and each of them, are denied.

IV. The Defendants, and each of them, are hereby granted 30 days within which to plead to the Complaint herein, said time being granted so as to enable the Defendants, if they shall be so advised, to file, in our Appellate Courts, their petition for a writ of prohibition. This Judge suggests that it appears from the face of the Complaint: that the trial of this cause will require a considerable number of trial days; that the testimony of a large number of witnesses will be required; that the trial will be expensive to the parties and to this County and State; that though this Judge has, to the best of his ability, reviewed all of the authorities cited by all counsel and additionally has done independent research on the questions involved, the law as to the pre-emption of jurisdiction under the

Labor-Management Relations Act, as amended, appears to be in such a state of flux in our appellate courts and, at least, lacking in that reasonable certainty in which law should normally exist; that it would be for the benefit of all the parties and this Court, if Defendants would test the rulings of this Court as to the jurisdictional questions by the filing of a Petition for a Writ of Prohibition; and therefore to enable Defendants so to do this Court asserts that unless it be prohibited by a writ of prohibition from an appeliate court of this State from so doing it will continue to assert jurisdiction over the Complaint and each of the causes of action thereof.

Dated: March 29, 1960

/s/ ALFRED GITELSON,
Judge of the Superior Court

APPENDIX 'C.

(1) Excerpt from Petition for Writ of Prohibition to California Supreme Court:

"VIII

The said Superior Court of the State of California in and for the County of Los Angeles has no jurisdiction over said matter for the reason that the National Labor Relations Board has the sole jurisdiction over said matter, since said Board has preempted jurisdiction of the questions here involved. Therefore, this matter falls within the sole jurisdiction of said National Labor Relations Board."

(2) Excerpt from Petition for Writ of Prohibition to District Court of Appeal, State of California.

"VIII

The said Superior Court of the State of California in and for the County of Los Angeles has no jurisdiction over said matter for the reason that the National Labor Relations Board has the sole jurisdiction over said matter, since said Board has pre-empted jurisdiction of the questions here involved. Therefore, this matter falls within the sole jurisdiction of said National Labor Relations Board."

(3) Excerpt from Opinion of Superior Court Judge Alfred Gitelson, dated March 29, 1960:

"IV. The Defendants, and each of them, are hereby granted 30 days within which to plead to the Complaint herein, said time being granted so as to enable the Defendants, if they shall be so

advised, to file, in our Appellate Courts, their petition for a writ of prohibition. This Judge suggests that it appears from the face of the Complaint: that the trial of this cause will require a considerable number of trial days; that the testimony of a large number of witnesses will be required; that the trial will be expensive to the parties and to this County and State; that though this Judge has, to the best of his ability, reviewed all of the authorities often cited by counsel and additionally has done independent research on the questions involved, the law as to the pre-emption of jurisdiction under the Labor-Management Relations Act, as amended, appears to be in such a state of flux in our appellate courts and, at least, lacking in that reasonable certainty in which law should normally exist; that it would be for the benefit of all the parties and this Court, if Defendants would test the rulings of this Court as to the jurisdictional questions by the filing of a Petition for a Writ of Prohibition; and therefore to enable Defendants so to do this Court asserts that unless it be prohibited by a writ of prohibition from an appellate court of this State from so doing it will continue to assert jurisdiction over the Complaint and each of the causes of action thereof. Dated: March 29, 1960."

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1960

No. 577

[illegible] SMITH, DISTRICT DIRECTOR, OF UNITED STEELWORKERS OF AMERICA AN INTERNATIONAL UNION AFFILIATED WITH THE AFL-CIO, INDIVIDUALLY AND IN A REPRESENTATIVE CAPACITY FOR AND ON BEHALF OF UNITED STEELWORKERS OF AMERICA AN INTERNATIONAL UNION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA DISTRICT 38 AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, DISTRICT 38 SUB-DISTRICT 1 AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, LOCAL [illegible] AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO

and

[illegible] NICHOLAS N. CHELEDEN

vs.

[illegible] SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

and

[illegible] ANTHONY J. GUZZO

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR REAL PARTY IN INTEREST IN OPPOSITION

THEODORE G. [illegible]
[illegible] E. BOSTICK
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Long Beach [illegible]
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IN THE

Supreme Court of the United States

October Term, 1960

No. 577

CHARLES J. SMITH, DISTRICT DIRECTOR OF UNITED STEELWORKERS OF AMERICA, AN INTERNATIONAL UNION, AFFILIATED WITH THE AFL-CIO, INDIVIDUALLY AND IN A REPRESENTATIVE CAPACITY FOR AND ON BEHALF OF UNITED STEELWORKERS OF AMERICA, AN INTERNATIONAL UNION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, DISTRICT 38, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, DISTRICT 38, SUB-DISTRICT 1, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO; UNITED STEELWORKERS OF AMERICA, LOCAL 2018, AN UNINCORPORATED ASSOCIATION, AFFILIATED WITH THE AFL-CIO,

and

ALGERDAS N. CHELEDEN,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent,

and

ANTHONY J. GUZZO,

Real Party In Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR REAL PARTY IN INTEREST IN OPPOSITION

OPINIONS BELOW

Reference is made to petitioners' petition on file herein, and more particularly to the "Citations to Opinions Below" set forth at page 2 thereof.

In addition thereto, the Memorandum Opinion of the District Court of Appeal, Second Appellate Dis-

trict, State of California, wherein petitioners' Petition for a Writ of Prohibition was denied, is printed in Appendix A hereto, *infra*, pp. 1a-17a.

JURISDICTION

The Judgment of the Supreme Court of the State of California was entered on September 14, 1960. The jurisdiction of this Court has been invoked by petitioners under 28 U.S.C. Section 1257 (3).

STATUTES INVOLVED

The statutory provisions involved are National Labor Relations Act, 61 Stat. 140ff, 29 U.S.C. Section 157, Section 158(b) (1), Section 159(a) and Section 160(a). They are printed in Appendix A, pp. 1-3 of petitioners' petition and will not be repeated herein, except by reference.

QUESTIONS PRESENTED

1. Whether a state court has jurisdiction to award damages to an individual labor union member in a civil action against his labor union on a cause of action arising from the union's wilful and bad faith act of dismissing an arbitration proceeding, the purpose of which was to return the member to his prior employment, together with back wages, or whether any provision of the National Labor Relations Act, 1947, prevents the state court from assuming such jurisdiction.

2. Whether the state court has jurisdiction to award damages to an individual labor union member in a civil action against an attorney representing both he and his labor union, where the interests of each client were conflicting, and where said attorney breached

the fiduciary duty owed to the union member in an arbitration proceeding aimed at getting said union member back his job, or whether any provision of the National Labor Relations Act, 1947, prevents the state court from assuming such jurisdiction.

STATEMENT

The Real Party in Interest, Anthony J. Guzzo, filed his Sixth Amended Complaint for damages for breach of fiduciary relationship, intentional breach of attorney-client relationship, malpractice and conspiracy, in the Superior Court of the State of California, in and for the County of Los Angeles. Guzzo, who was president of the unit comprising the Southwest Steel employees represented by defendant unions, took part in a strike by the local unit against their employer, Southwest Steel, due to the faulty safety measures being taken by said employer. During the period of the strike the Southwest Steel Company filed a damage suit against the defendant unions in the Federal District Court under Section 301 (a) of the National Labor Relations Act, claiming that the strike was in violation of a collective bargaining agreement then in force.

The strike terminated and upon returning to work, Guzzo was peremptorily discharged by the employer. The defendant unions commenced a grievance procedure and then an arbitration proceeding under the terms of the collective bargaining agreement on behalf of Guzzo, to return him to his former job. The employer filed an action in the State Court to enjoin the arbitration. Then the employer and defendant unions agreed that if the defendant unions dismissed

the arbitration suit of Guzzo, that the employer would dismiss the damage suit against the defendant unions, which agreement they proceeded to execute, contrary to the wishes of Guzzo and without his knowledge or consent. During all these activities, defendant Algerdas N. Cheleden was attorney of record of both the defendant unions and for Guzzo, and actively participated in all the transactions alleged.

For the complete allegations of fact, reference is hereby made to the record filed herein by petitioners pursuant to the requirements of Rule 21 (1), and more particularly to the Exhibits to Petition for Writ of Prohibition, pp. 1-17.

The question whether the State Court had jurisdiction over this matter was first raised by petitioners by way of demurrer in the Superior Court (Court of first instance) which was overruled; thereafter it was raised in the District Court of Appeal of California by a Petition for Writ of Prohibition, which petition was denied with an accompanying Memorandum Opinion (See Appendix A, *infra*, pp. 1a-17a); thereafter the question was raised in the Supreme Court of California by Petition for Writ of Prohibition, which petition was summarily denied.

ARGUMENT

I

The Acts Alleged Do Not Constitute Unfair Labor Practices Under The Labor Management Relations Act.

Petitioners have alleged that the acts complained of by the Real Party in Interest herein constituted an unfair labor practice within the purview of Sec-

tions 8 (a) and (b) of the Labor Management Relations Act (hereinafter designated LMRA).

The pertinent sections of the LMRA appear in Appendix A, pp. 1-3 of Petitioners' petition on file herein and are hereby referred to.

A careful study of these sections of the LMRA fails to indicate wherein the acts complained of are within the purview of these sections. None of the sections relied upon by petitioners seem to deal with the situation involved in the instant case. Further, petitioners have been unable to supply any case to this Court holding that the acts complained of constitute an unfair labor practice.

Section 7 protects employees' rights to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is obviously a section guaranteeing and protecting employees' rights to organize, bargain collectively, and to engage in concerted activities, and does not even remotely concern itself with protecting the individual union member against misconduct against himself by his own union.

Section 8 at the outset makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of rights which are guaranteed by Section 7, but, as is apparent from the examination of Section 7 above, this provision has no application in the present situation.

Section 8 next specifies that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in vio-

lation of sub-section (a)(3) of the section, more specifically, to cause or attempt to cause an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization".

Nowhere does the amended complaint herein allege that the union caused or attempted to cause the employer to do any of these acts. Rather, it alleges that the unions violated a duty they owed to their own member and that they acted in bad faith towards him to further their own selfish motives.

The other provision of section 8 that it is an unfair labor practice for a union to cause or attempt to cause an employer "to discriminate against an employee with respect to whom membership in such (union) has been denied or terminated on some ground other than his failure to tender . . . dues . . ." is obviously not applicable here either, since the complaint charges that the real party in interest was at all times alleged a member of the defendant unions.

Petitioners have further alleged that the decision of the court below is in conflict with the decision of the Seventh Circuit Court of Appeals in *N.L.R.B. v. Die and Tool Makers Lodge No.* 113, (*Peerless Tool*), 231 F. 2d 298, (C.A. 7, 1956) Cert. denied 352 U. S. 833, and with the earlier decision of this Court in *Wallace Corp. v. N.L.R.B.*, 323 U. S. 248 (1944).

This is patently untrue, for in the *Wallace* case the acts and litigation occured prior to enactment of the LMRA and involved discriminatory conduct against a minority group, whereas in the *Peerless Tool* case, the employees were forced into making donations to the union before the union would process their grie-

vances. In neither of these cases were the fact situations at all similar to the one presently before this Court, nor was the present question of pre-emption involved, and it is difficult to understand how those decisions could conceivably be in conflict with the decision below in the instant case.

Petitioners again allege that the decision of the Court below was in conflict with the decisions in *Huffman v. International Union, etc.*, 195 F. 2d 179 (C.A. 6) reversed on other grounds, *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1952); *R.K.O. Radio Pictures, Inc.*, 61 N.L.R.B. 112; *Southwestern Portland Cement Co.*, 61 N.L.R.B. 1217; *Larus and Brothers Company, Inc.*, 62 N.L.R.B. 1075; and *Hughes Tool Company*, 104 N.L.R.B. 318 (1953). Petitioners expressly admit that in none of the cited cases was the question of National Labor Relations Board pre-emption squarely passed upon, yet they then charge that the necessary *implication* of those decisions is in conflict with the decision in the court below. It would seem that an *implication* derived from another decision would be of insufficient force to compel this Court to find that the decision in the lower court herein should be reviewed.

In the *Hughes* case, *supra*, the sole question was whether the Union's certification could be revoked for the practice of charging a fee to process the grievances and arbitrations of members and non-members of the union. This conduct was held by the court to be a violation of Section 9 of the LMRA, permitting the Board to revoke the Union's certification. The mere fact that the Board could revoke a union's certification for violations of Section 9, does not also

mean that the state court has been divested of its jurisdiction over an action by an individual union member against the union for damages.

This view is clarified by examining the *Larus* case, *supra.*

> "The Board has no express authority to remedy undemocratic practices within the structure of union organizations, but we have conceived it our duty under the statute to see to it that any organization certified under Section 9 (c) as the bargaining representative acted as a genuine representative of *all* the employees in the bargaining unit. Emphasis supplied."

Thus, the Board recognized that the LMRA had given it no express authority to remedy this type of practice, except under Section 9 (c). The Board was simply stating that although it was powerless to *directly* remedy the wrongs committed, it could *indirectly* do so by removing the Union's certification.

It is obvious, then, that petitioners cannot supply authorities to show this Court that the violations complained of herein were unfair labor practices. None exist, because Congress never expressed in the LMRA an intent to include the violations in the instant case within the provisions defining unfair labor practices. See *Colgate-Palmolive-Peet Co. v. Warehouse and Warehousemen's Union* (CA 1955), 282 P. 2d 1015; *Baun v. Lumber and Sawmill Worker's Union, etc.*, 284 P. 2d 275, 46 Wash. 2nd 645.

The rights of the real party in interest herein were not created by the LMRA, but by the contract existing between the Petitioner Union and the Real Party in Interest, as embodied in the union constitu-

tion. See *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 58, 59, 63, 64, 355 U. S. 932, 2 Law Ed. 2d 415, 78 Sup. Ct. 413; *Harris v. National Union of Marine Cooks and Stewards*, 98 Cal. App. 2d 733, 736.

It would thus seem apparent that the State Court may assume jurisdiction over this case. The Real Party in Interest's right to damages is created by the laws of this State, independently of, and not predicated upon or created by the L.M.R.A. The liability of an agent to his principal is determined in accordance with the principles of the general law of contracts. See *Dotson v. International Alliance of Theatrical Stage Employees*, 34 Cal. 2d 362-374, 375; *Smetherham v. Laundry Worker's Union Local No. 75*, 44 Cal. App. 2d 131-139; *Harris v. National Union of Marine Cooks & Stewards, supra*; *Anderson v. Badger*, 84 Cal. App. 2d 736.

II

The State Court Has Jurisdiction Over This Matter Even Assuming That The Violations Alleged Herein Constitute An Unfair Labor Practice Within The L.M.R.A.

Petitioners have, in support of their petition, relied heavily upon the language in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236. The following portions of the Court's opinion in the *Garmon* case will make it evident that, even assuming the acts herein were unfair labor practices, that the State Court may still assume jurisdiction over this matter.

"What we said in *Weber v. Anheuser-Busch, Inc.*, 343 U. S. 468, 99 L Ed. 546, 75 S. Ct. 480,

deserves repetition, because the considerations there outlined guide this day's decision: 'By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the commerce clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters Union, supra.* But as the opinion in that case recalled the LMRA leaves much to the states, though Congress has refrained from telling us how much'. 346 U. S., at 488. The penumbral area can be rendered progressively clear only by the course of litigation." 348 U. S. at 480, 481.

To this point, then, the Court has told us that an area does exist within which the State Courts may assume jurisdiction, even when an unfair labor practice is involved. Let us proceed to the next salient portion of the Court's opinion and see whether it can more clearly define this area.

"When the exercise of state's power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. (Cases cited). However, due regard for the presuppositions of our

embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a *merely peripheral concern* of the L.M.R.A. See *International Assn. of Machinists v. Gonzales*, 356 U. S. 617, 42 L.R.R.M. 2135. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absense of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. *United Automobile Workers v. Russell*, 356 U. S. 634, 42 LRRM 2142; *Youngdahl v. Rainfair*, 355 U. S. 131, 41 LRRM 2169; *Auto Workers v. Wisconsin Board*, 351 U. S. 256, 38 LRRM 2165; *United Construction Workers v. Laburnum*, 347 U. S. 656, 34 LRRM 2229." (Emphasis supplied)

The Court then goes on as follows:

"When it is *clear* or may *fairly be assumed* that the activities which a State purports to regulate are protected by Section 7 of the Taft-Hartley Act, or constitute an unfair labor practice under Section 8, due regard for the Federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so *plainly* within the central aim of Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State Laws." (Emphasis supplied)

At this point, then, this Court has defined the areas within which the State may assume jurisdiction. First,

the general rule, which holds that where it is *clear* or may *fairly be assumed* that the activities which a state purports to regulate are protected by Section 7 of the LMRA, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield.

The exceptions to this general rule are twofold: first, where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress had deprived the States of the power to act. The Court later defines this exception and limits it to cases where violence is involved, favorably citing its previous decisions in the *Russell*, *Rainfair*, *Wisconsin Board* and *Laburnum* cases *supra*. Secondly, an exception was noted where the activity to be regulated was a *merely peripheral concern* of the L.M.R.A. With regard to this exception, the Court cited with favor *International Assn. of Machinists v. Gonzales*, 356 U. S. 617, 42 LRRM 2135. Thus, even following Petitioners' assumption, for argument's sake, that the acts herein constituted an unfair labor practice, the aforementioned exception to the general rule of pre-emption would apply to the instant case.

At the outset, it must be said that it is neither *clear* nor may it *fairly be assumed*, that the activities in the instant case constituted an unfair labor practice, in accordance with the general rule of pre-emption expressed above. As pointed out previously, a careful study of Sections 7, 8 (a) and (b) of the LMRA does not clearly, or at all, define the present activities as an unfair labor practice, and on this is-

sue alone, petitioners' contentions must fail.

But let us proceed further to the aforementioned exception which the real party in interest contends will permit the State Court to assume jurisdiction. Again, it is to be stressed that the real party in interest contends that the activities complained of in the instant case, whether an unfair labor practice or not, were a *merely peripheral concern* of the L.M.R.A. as the Court points out in the *Garmon* case, wherein it cites with favor the *Gonzales* case. An examination of the facts and opinion in the *Gonzales* case should aid in clarifying the question whether the activities in the present case are also of a *merely peripheral concern* of the L.M.R.A.

The *Gonzales* case was an action in the Superior Court of the City and County of San Francisco, California. A labor union member, claiming to have been expelled from membership in violation of his rights under the union constitution and by-laws, was ordered reinstated, and awarded damages for lost wages and physical and mental suffering. Judgment was affirmed by the California District Court of Appeals, 1st District Division 1 (142 CA2d 207, 298 P. 2d 92), and the Supreme Court of California denied rehearing.

On certiorari, the United States Supreme Court affirmed the judgment below. Justice Frankfurter, speaking for six members of the court, ruled that nothing in the L.M.R.A. as amended, displaced state power to award a wrongfully expelled union member damages for loss of wages and suffering resulting from a breach of his union membership contract. The Court stated:

"Since we deal with implications to be drawn

from the Taft-Hartley Act for the avoidance of conflicts between enforcement of federal policy by the N.L.R.B. and the exertion of state power, it might be abstractly justifiable, as a matter of wooden logic, to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded. In such a suit there may be imbedded circumstances that could constitute an unfair labor practice under Section 8 (B)(2) of the Act. In the judgment of the Board, expulsion from a union, taken in connection with other circumstances established in a particular case, might constitute an attempt to cause an employer to "discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . ." 61 Stat 141, 29 USC sec. 158 (b)(2). But the protection of unions members in their rights as members from *arbitrary conduct* by unions and union officers has *not* been undertaken by federal law, and indeed the assertion of any such power has been expressly denied.

The proviso to section 8 (b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein' . . . 61 Stat 141, 29 USC sec. 158 (b)(1). The present controversy is precisely one that gives legal efficacy under

state law to the rules prescribed by a labor organization for '*retention of membership* therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U. S. 656, 98 L.ed. 1025, 74 S. Ct. 833.

"Although if the union's conduct constituted an unfair labor practice the Board might possibly have been empowed to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is hereby presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.-I.W. v. Russell*, 356 U. S. 634, 2 L.ed. 2d 1030, 78 S. Ct. 932. If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the N.L.R.B., a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility

of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under section 8 (b)(2). This important distinction between the purposes of the federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination after union ouster from membership. The State Court proceedings deal with arbitrariness and

misconduct vis-a-vis the individual unions members and the union; the Board proceeding, looking principally to the nexus between the union action and employer discrimination, examines the ouster from membership in entirely different terms.' *Isaacson, Labor Relation Law: Federal Versus State Jurisdiction*, 42 ABAJ 415, 438 (Emphasis supplied). See also *Allen v. AFL*, 35 Labor Cases 71, 719."

The opinion in the *Gonzales* case, *just* cited, and looked upon with such favor in the *Garmon* case, makes it clear that the acts complained of in the instant case are of the same *peripheral* nature as those spoken of in the *Gonzales* case. In fact, the acts in the instant case seem far more *remote* from conflict with federal policy than those in the *Gonzales* case.

This becomes evident after a brief examination of the facts in the instant case. The petitioner unions agreed to process the real party in interest's complaint through grievance and arbitration, as they were bound to do by the terms of the union constitution wherein they were his exclusive bargaining agents. This they did, to a point, and then in bad faith, they *arbitrarily* and without cause, dismissed the arbitration case with prejudice, forever preventing him from being reinstated to his job. Further, they allowed the applicable statute of limitations to expire with regard to his right to proceed before the N.L.R.B., LMRA, Section 10 (d), and by their own act thus prevented him from processing his grievance through the very channel which they now claim is the only one properly open to him.

And the *arbitrary conduct* spoken of in the *Gonzales*

case opinion is also most apparent from the face of the amended complaint on file herein, and the court, in the *Gonzales* case, expressly found that union members have not been protected by federal law from such *arbitrary conduct* as exists here.

Here, as in the *Gonzales*, case, "to preclude the state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership . . ."* would leave the real party in interest without a remedy. And here, as in the *Gonzales* case, "such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act . . ."** And again, it may be asked where in the L.M.R.A. is there a compelling indication that the acts alleged herein could conflict with national policy? What occurred is more aptly defined to be in the nature of *private* acts between petitioner unions and a member, of a *merely peripheral concern* of the L.M.R.A.

And here, as in the *Gonzales* case, the Board could in no event award general or punitive damages to the real party in interest. Further, "the potential conflict with federal policy is too contingent, and remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving the state court of jurisdiction to vindicate the personal rights of the real party in interest."* And here, too, this is emphasized by the fact that the subject matter of the litigation in the present case was based upon a breach

* *International Association of Machinists v. Gonzales*, 356 U.S. 617, 42 L.R.R.M. 2135.

of a duty created by the contract governing relations between the petitioners and the real party in interest. As in the *Gonzales* case, this suit does not purport to remedy or regulate union conduct, but deals only "with arbitrariness and misconduct vis-a-vis the individual union members and the union".*

III

The State Court Has Jurisdiction Over The Causes Of Action Relating To Petitioner Cheleden.

It is clear that in no manner may petitioner Cheleden rely upon the provisions of the L.M.R.A. to prevent the State Court from assuming jurisdiction over this matter.

He is a private citizen, not an employer engaged in interstate commerce or a labor union, and nowhere within the purview of the L.M.R.A. is the National Labor Relations Board given any jurisdiction over a suit involving one individual against another. 61 Stat. 136.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THEODORE G. LEE
LESLIE B. JOSEPH
GYLER & GOTTLIEB

By: EMANUAL GYLER
Counsel for Real Party In Interest

** San Diego Building Trades Council v. Garmon*, 359 U. S. 236.
* *International Assn. of Machinists v. Gonzales*, 356 U. S. 617, 42 L.R.R.M. 2135.

APPENDIX A

2nd Civil No. 24689

In The District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

SMITH, UNITED STEELWORKERS OF AMERICA, CHELEDEN, et al,

Petitioners,

vs.

SUPERIOR COURT, et al,
and
ANTHONY J. GUZZO,

Respondent,

Real Party in Interest.

Petitioners seek prohibition to restrain the respondent court from proceeding further in an action brought against them and pending in said court upon the principal ground that the subject matters of said action are within the exclusive jurisdiction of the National Labor Relations Board and that, therefore, the respondent state court has no jurisdiction to hear and determine said matters.

The respondent court has overruled petitioners' demurrers to the plaintiff's sixth amended complaint and petitioners' objections to its jurisdiction to enter-

tain said action, has denied petitioners' motions to strike said amended complaint, and threatens to proceed with a lengthy and burdensome trial of the action unless restrained by this court.

The defendants in the action pending below, who are the petitioners herein, are various labor unions (United Steelworkers of America and affiliated labor unions) and officers and agents thereof, and one Cheleden, an attorney at law.

The plaintiff in the action pending below, who is the real party in interest herein, is one Guzzo, who was a member of the defendant unions and an employee of a certain steel company prior to his discharge by said employer.

Plaintiff's said sixth amended complaint sets forth five causes of action for damages; two of said counts are against the defendants, other than Cheleden, for alleged breaches of fiduciary relationship; two of said counts are against the defendant Cheleden alone for alleged intentional breach of attorney-client relationship, and for alleged malpractice; and the remainder count is against all the defendants for alleged conspiracy to prevent plaintiff from being reinstated to his former employment.

The essence of plaintiff's alleged causes of action against the defendant unions is:

That, prior to his discharge, plaintiff was a member of said unions and an employee of a steel company engaged in interstate commerce;

That the constitution of the unions provided that the unions shall act as exclusive agent for its members and represent them in the adjustment and settle-

ment of all grievances relating to terms and conditions of employment;

That the collective bargaining agreement between plaintiff's employer and the unions specified in essence that the employer should not peremptorily discharge employees; that the unions' grievance committee could represent the employee if he so desired in the adjustment of grievances; and that the employer should reinstate with full back pay any employee suspended or discharged unjustly by the employer if the employer or an arbitrator shall determine, in accordance with procedures provided for in the collective bargaining agreement, that an employee had been suspended or discharged unjustly.

That on 2/15/56 members of the unions, including plaintiff, employed at the employer's local steel plant walked off the job as a result of a certain dispute; that immediately thereafter the unions ratified said actions and called a strike; that said strike continued until 3/25/56.

That on 3/27/56 the employer wrongfully and without cause suspended plaintiff for five days for his alleged participation in the strike; and that, on 4/2/56, the employer wrongfully and without cause and in violation of the collective bargaining agreement discharged plaintiff; and that plaintiff was the only union member and employee discharged who had participated in said strike.

That the employer on 3/15/56, while the strike was still continuing commenced an action for damages against the unions and plaintiff in the U. S. District Court. The said action was filed pursuant to section 301(a) of the Labor Management Relations Act to

recover damages for alleged violation by the unions and plaintiff of provisions of the collective bargaining agreement prohibiting the calling of a strike during the term of said agreement.

That following plaintiff's suspension and discharge, the unions and their agents, pursuant to their duty to represent plaintiff, undertook his representation in an arbitration proceeding to secure his reinstatement to employment. That subsequently the employer commenced an action in our local superior court seeking to enjoin said arbitration proceeding.

That later the unions, in violation of their duty to plaintiff and without his knowledge, dismissed the arbitration proceeding in consideration of a dismissal by the employer of its federal action for damages. That said exchange of dismissals was effected without regard to plaintiffs' rights and in violation of the unions' fiduciary relationship to plaintiff; that, by said exchange, the unions gained an advantage for itself (i.e. release from damages claimed by the employer) and plaintiff suffered a detriment (i.e. loss of his right to reinstatement and back pay). The prayer seeks recovery of damages for plaintiff's wage loss, and $250,000 as exemplary and punitive damages.

Briefly the essence of plaintiff's separate causes of action against the defendant Cheleden alone is that the unions paid to Cheleden, an attorney at law, portions of plaintiff's union dues as a retainer for Cheleden's representation as an attorney of plaintiff and the unions in the said federal, state and arbitration cases; that Cheleden agreed to represent and represented the unions and plaintiff in said cases; that, in violation of his obligation to represent plaintiff and

in order to gain an advantage for the unions, he dismissed the arbitration proceeding without plaintiff's knowledge or consent as a part of the deal between the employer and the unions.

Petitioners' basic contention is that the claimed illegal conduct alleged in the amended complaint for which damages are sought is "arguably" or potentially" within the compass of #7 and #8 of the National Labor Relations Act as amended (29 U.S.C.A., #157, #158)[1]; and that, therefore, the respondent state court has no jurisdiction to entertain an action for damages resulting from such conduct under the doctrine laid down in *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, 3 L.ed. 775. It is likewise contended by petitioners that the said Garmon case is conclusive and controlling herein.

The essence of the position of the real party in interest is that the conduct complained of in the amended complaint does not fall within the purview of #7

[1] Section 8 of said act (29 U.S.C.A., #158) provides insofar as material herein: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 157 . . .; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminted . . ."

Section 7 (29 U.S.C.A., #157) provides in part: "Employees shall have the right to self-organization . . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection . . ." Subsection (a)(3) of section 8 (29 U.S.C.A., #158, subsection (a)(3)) specifies in part that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

and =8 of the National Labor Relations Act; and that *International Asso. Machinists v. Gonzales* (1958), 356 U. S. 67, 2 L.ed. 2d 1018 is controlling and conclusive herein.

For the reasons later stated, neither Gonzales nor Garmon can be said to be in point, controlling or conclusive herein. The matter at bar is factually different in material respects from the situations before the court in Gonzales and Garmon; and the instant matter presents questions not involved nor considered in said cases.

Writ of prohibition should not issue herein, in our opinion, for the following reasons: (a) the alleged illegal conduct for which damages are sought does not "directly," nor "arguably" nor "potentially" fall within the compass of =7 and =8 of said act; and (b) while the alleged conduct falls within the purview of =9 of said act (29 U.S.C.A., =159) as interpreted and applied by the National Labor Relations Board,[2] there is no authority nor valid reason for holding that state courts should be divested of jurisdiction to award damages for conduct which is violative *only* of section 9 and not of sections 7 or 8 of the act.

[2] Section 9 of the National Labor Relations Act as amended (29 U.S.C.A., =159) provides in part, "Representatives designated or selected by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."; and, as hereinafter discussed, the N.L.R.B. by its decisions has interpreted and applied this section as casting a duty on labor organizations, impartially and without discrimination to process grievances and as ground for revoking a union's certification as exclusive bargaining agent if such duty be violated.

An examination of the decisions in Gonzales and Garmon and of the specific provisions of section 7, 8 and 9 of the act makes it evident that the aforesaid conclusions are the only reasonable conclusions justified under the particular circumstances herein.

International Asso. Machinists v. Gonzales, supra, 356 U. S. 617, 2 L.ed. 1018, affirmed a California state court judgment[3] awarding damages to an expelled member of a labor union for lost wages and suffering resulting from said member's expulsion from membership in violation of his rights under the union's constitution and by-laws.

After commenting that it might be abstractly justifiable as a matter of wooden logic to suggest that an action in a state court by a member of a union for restoration of his membership rights is precluded, the Supreme Court held that ". . . the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied [in the proviso to §8(b)(1) of the National Labor Relations Act]."

The Supreme Court further stated that ". . . to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights"; that "[s]uch a drastic result, on the remote possibility of some entanglement with the Board's enforcement of national policy, would require a more compelling indication

[3] *Gonzales v. Internat. Assn. of Machinists*, 142 Cal. App. 2d 207

of congressional will than can be found in the interstices of the Taft-Hartley Act . . ."; that "[t]he National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages"; and that ". . . the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered."

In citing and commenting on Gonzales in its subsequent Garmon decision (3 L.ed. 2d 775, 782, to be presently discussed), the Supreme Court stated, "However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a *merely peripheral concern* of the Labor Management Relations Act. See International Asso. of Machinists v. Gonzales . . ." (Emphasis added.)

While various statements in Gonzales afford apparent support to the contentions of the real party in interest herein, the facts and questions presented in Gonzales were materially different from those presented in the case at bar. As the Supreme Court expressly pointed out in Gonzales, the National Labor Relations Act does not undertake to regulate the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. On the contrary and with respect to the matter at bar, section 9 of said act, as interpreted and applied by the National Labor Relations Board in

decisions hereinafter discussed, imposes a duty on a labor organization impartially and without discrimination to accept and process all grievances placed in its hands by the employees it represents.

As contrasted to Gonzales, the Supreme Court in its subsequent decision in *San Diego Bldg. Trades Council v. Garmon, supra*, 359 U. S. 236, 3 L.ed. 2d 775, reversed a California state judgment[4] awarding damages to an employer against a union which had engaged in peaceful picketing found to be tortious and illegal under California law, even though the National Labor Relations Board had declined to exercise jurisdiction.

All the justices were in accord that the union's activities for which the state awarded damages were protected under the National Labor Relations Act, and that, therefore, state action was precluded until the National Labor Relations Board had made a contrary determination respecting such activities.

However, the decision of the court as set forth in the opinion of the majority placed its determination upon broader grounds, stating inter alia:

"It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions [as to whether the behavior of the unions constituted an unfair practice under =8 of the act or was protected under section =7] in the same manner. When an activity is *arguably* subject to =7 or =8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . The gov-

[4] *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595.

erning consideration is that to allow the States to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy." (Emphasis added.)

Also and with reference to the contention that the State should be permitted to award damages which the Board could not award, the decision held: "Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. . . . In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."

While various statements in Garmon afford apparent support to petitioners' contentions, the facts and questions presented in Garmon were also materially different from those presented in the case at bar.

Garmon involved conduct on part of the labor unions against the employer which the National Labor Relations Board has jurisdiction to enjoin; and, as the Supreme Court expressly pointed out in Garmon, it was clear or could be fairly assumed that such conduct was protected by section 7 of the National Labor Relations Act or constituted an unfair labor practice under section 8 of said act.

On the contrary, the case at bar relates to alleged misconduct vis-a-vis the individual union member and the unions; and, as will be presently shown, such

conduct was at most in violation of section 9 of the act, and it did not even "arguably" or "potentially" fall within the compass of section 7, or section 8 of the act.

Since neither Gonzales nor Garmon involved or were concerned with a factual situation comparable to the one presented in the matter at bar, this court is faced herein with the problem and task alluded to by Mr. Justice Frankfurter in Gonzales (2 L.ed. 2d 1018, 1021) wherein he stated: "The statutory implications concerning what has been taken from the States and what has been left to them are of Delphic nature, to be translated into concreteness by the process of litigating elucidation."

It is clear from the allegations of the amended complaint herein that the conduct for which damages are sought is the alleged violation by the defendants of their purported duty to represent the plaintiff union member in good faith in the arbitration proceeding, and the alleged duplicity of defendants in dismissing the arbitration proceeding without his knowledge or consent in order to secure an unfair advantage for themselves, i.e. in consideration of securing a dismissal of the employer's action against them for damages.

The essential, pertinent provisions of section 7 and section 8 of the National Labor Relations Act as amended have hereinabove been set forth at footnote 1, page 4 hereof; and nothing in said provisions can reasonably be said to even "arguably" or "potentially" indicate that the conduct complained of in the amended complaint was protected under section

7 or constituted an unfair labor practice under section 8 of said act.

Section 7 is a protection of employees' right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection. It is obviously a section guaranteeing and protecting employees' rights to organize, bargain collectively, and engage in concerted activities; and it is not even remotely concerned with protection of the individual union member against misconduct against him by the union of which he is a member.

Section 8 first makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7; but, for the reasons indicated immediately above, said provision clearly has no relevancy to the instant situation.

Section 8 next specifies that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of said section, i.e. to cause or attempt to cause an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization."

The amended complaint herein nowhere charges that the union caused or attempted to cause the employer "by discrimination in regard to . . . tenure of employment to encourage or discourage membership in any labor organization." On the contrary, it charges

that the unions violated a duty which they owed to one of their own members and acted in bad faith towards him for their own selfish advantage.

The further provision of section 8 specifying that it is an unfair labor practice for a union to cause or attempt to cause an employer "to discriminate against an employee with respect to whom membership in such [union] has been denied or terminated on some ground other than his failure to tender . . . dues . . ." obviously is inapplicable herein, since the complaint alleges that the plaintiff was at all times involved a member of the defendant unions.

The foregoing examination of the provisions of sections 7 and 8 of the act puts it beyond question that the conduct for which damages are sought herein does not directly, arguably or potentially fall within the compass of said sections 7 and 8 of the act.

It is true that the plaintiff's original discharge by the employer may have amounted to conduct on the employer's part which may have been arguably within the compass of sections 7 or 8 of the act. However, it is not such conduct that is complained of, but the subsequent conduct of the unions and its agents in violating their duty to represent the employee.

It is also true, that as in Gonzales, a remote possibility of some entanglement with enforcement of national policy can be conceived; but it is further very clear that the conduct herein would at most be a "peripheral concern" of the federal act, since the state court proceeding herein is only concerned with the misconduct vis-a-vis the individual union member

and the defendant unions and their agents. (*International, etc. v. Gonzales, supra,* 2 L.ed. 2d 1018, 1023.)

Although the conduct complained of is not arguably subject to sections 7 or 8 of the act, said conduct appears to fall within the compass of section 9 of the act[5]; and it, therefore, has also to be considered whether the respondent state court is divested of jurisdiction by reason thereof.

Preliminarily in this connection, it should be pointed out that, in *Hughes Tool Company, etc.*, 104 N.L.R.B. No. 33, 32 L.R.R.M. 1010, and other decisions, the National Labor Relations Board has held that section 9(a) of the act casts a duty on labor organizations to accept and process all grievances placed with them by employees; and that, for a violation of such duty, a union's certification as exclusive bargaining agent can be revoked.

As the Board very clearly stated the matter in *Hughes Tool Company, supra,* "We accordingly, find that the amended Section 9(a) still gives rise to a duty by Labor organizations, as the exclusive representatives in grievance proceeding (other than those processed through preference by the individual himself), impartially and without discrimination to accept and process all grievances placed in its hands by the employees it represents . . ." (See also: *Ford Motor Co. v. Huffman,* 345 U. S. 330, 336, 97 L.ed. 2d 1048, 1057.)

While section 9 of the act may have imposed a duty

[5] The essential provisions of said section 9 have hereinbefore been set forth at footnote 2, page 6 hereof.

on the defendant unions to represent the plaintiff union member and while the board may have been invested with power to revoke the certification of the unions for a violation thereof, it does not follow that the respondent state court was divested of jurisdiction herein by reason thereof. This is so for the following reasons.

First, *San Diego, etc. v. Garmon, supra,* only establishes that state courts are divested of jurisdiction to award damages for alleged illegal conduct where such conduct arguably falls within the compass of sections 7 and 8 of the act; and it has never been decided whether a violation of section 9 for which the Labor Board can only revoke the union's certification divests state courts of jurisdiction to award damages for said illegal conduct.

Secondly, the situation herein is akin to *International, etc. v. Gonzales, supra,* in that "[t]he National Labor Relations Board could not have given [plaintiff] the relief that California [can give] him according to its local law of contracts and damages," and that "the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered." (*International, etc. v. Gonzales, supra,* 2 L.ed. 1018, 1022.) In fact, the board herein could only revoke the unions' certifications which would not afford plaintiff any tangible relief.

Gonzales was not repudiated but cited with approval in the subsequent Garmon case; and, while certain of the comments in Garmon are somewhat difficult to reconcile with prior statements in Gonzales the ut-

terances of the United States Supreme Court have certainly not made it clear that state courts are divested of jurisdiction in a matter such as the one at bar.[6] In view thereof and the fact that the state court proceeding is only concerned with misconduct vis-a-vis the individual union member and the union, it is our conclusion that the respondent state court has not been ousted of jurisdiction to award damages for the specific misconduct alleged in the amended complaint.

Also in view of the foregoing, it is unnecessary to consider whether the attorney, Cheleden, stands in a different position than the union. Obviously, petitioners could only be entitled to a writ prohibiting the respondent court from proceeding against Cheleden on the theory or basis that the amended complaint establishes that Cheleden was the unions' agent; and, if the respondent court was not divested of jurisdiction to proceed against the unions as appears to be the only reasonable conclusion, it would necessarily follow that it could not be prohibited from proceeding against the unions' agent, Cheleden.

For the several reasons indicated, it is our conclusion that the petition for writ of prohibition herein should be denied.

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[6] L. A. Daily Journal of 6/7/60 and Metropolitan News of 6/10/60 report that, on last Monday 6/6/60, the U. S. Supreme Court held that a New York State law barring collection of dues by unions with ex-convicts as officers was valid despite the Taft-Hartley guarantee that employees may choose their own union representatives and the 1959 Labor Management Relations Act's five-year limit on ex-convict ban. The articles would indicate that the Supreme Court has still not laid it down as an inflexible rule that state courts are divested of jurisdiction merely because the federal statute may incidentally deal with the same subject.

In the event of petition for hearing in the Supreme Court a copy of this memorandum will be furnished to that tribunal.

Dated: June 14, 1960.

THE COURT, per FOX, P.J., ASHBURN, J. and KINCAID, J. Pro tem.